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In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN J. MCCARTHY, PETITIONER

v.

MR. MADDIGAN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether petitioner must exhaust the Bureau of Prisons' administrative grievance procedure before filing an action for money damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory and regulatory provisions involved	2
Statement	3
Argument:	
Petitioner must exhaust administrative grievance procedures established by the Federal Bureau of Prisons before filing a *Bivens* claim for money damages	13
A. This Court can impose reasonable limitations on the exercise of its power under *Bivens* in order to promote the effective functioning of government or to accommodate congressional policy	13
B. Exhaustion of the Bureau of Prisons' grievance procedure is needed to promote the effective functioning of the prisons and the courts	16
C. Congress has articulated a policy favoring exhaustion of prison grievance procedures prior to filing constitutional claims against government employees	23
D. The Bureau of Prisons' grievance process does not impair the effectiveness of the *Bivens* remedy	28
Conclusion	38

TABLE OF AUTHORITIES

Cases:

Bell v. *Wolfish*, 441 U.S. 520 (1979)	18
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)	3, 9, 10-11, 13, 14
Bowen v. *City of New York*, 476 U.S. 467 (1986)	32
Brice v. *Day*, 604 F.2d 664 (10th Cir. 1979), cert. denied, 444 U.S. 1086 (1980)	9, 18, 19
Bush v. *Lucas*, 462 U.S. 367 (1983)	11, 12, 13, 14, 15, 23, 28, 29, 36

Cases—Continued: Page

Butz v. *Economou*, 438 U.S. 478 (1978) 12, 13, 27, 28
Carlson v. *Green*, 446 U.S. 14 (1980) 14, 20, 28, 30
Chappell v. *Wallace*, 462 U.S. 296 (1983) 14
Chin v. *Bowen*, 833 F.2d 21 (2d Cir. 1987) 29
Cleavinger v. *Saxner*, 474 U.S. 193 (1985) 21
Coit Indep. Joint Venture v. *FSLIC*, 489 U.S. 861 (1989) 13, 16, 28, 29-30, 35, 36, 37
Davis v. *Passman*, 442 U.S. 228 (1979) 14
Estelle v. *Gamble*, 429 U.S. 97 (1976) 14, 15, 23
Felder v. *Casey*, 487 U.S. 131 (1988) 35
Goar v. *Civiletti*, 688 F.2d 27 (6th Cir. 1982) 9-10
Greene v. *Meese*, 875 F.2d 639 (7th Cir. 1989) 38
Haines v. *Kerner*, 404 U.S. 519 (1972) 22
Hallstrom v. *Tillamook*, 110 S. Ct. 304 (1989) 32
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 12, 15, 20
Hessbrook v. *Lennon*, 777 F.2d 999 (5th Cir. 1985) 10, 20
Honig v. *Doe*, 484 U.S. 305 (1988) 35
Hudson v. *Palmer*, 468 U.S. 517 (1984) 18
Johnston v. *Horne*, 875 F.2d 1415 (9th Cir. 1989) 29
Jones v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) 18
Martin v. *Catalanotto*, 895 F.2d 1040 (5th Cir. 1990) 21, 25
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 32
McGee v. *United States*, 402 U.S. 479 (1971) 16
McKart v. *United States*, 395 U.S. 185 (1969) 16, 17, 32
McNeese v. *Board of Educ.*, 373 U.S. 68 (1963) 34
McSurely v. *Hutchinson*, 823 F.2d 1002 (6th Cir. 1987), cert. denied, 485 U.S. 934 (1988) 29
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 15
Muhammad v. *Carlson*, 739 F.2d 122 (3d Cir. 1984) 9, 30
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) 16
Nixon v. *Fitzgerald*, 457 U.S. 731 (1982) 15, 16
Patsy v. *Board of Regents*, 457 U.S. 496 (1982) 12, 16, 23, 24, 25, 27, 32, 34
Pell v. *Procunier*, 417 U.S. 817 (1974) 18

Cases—Continued: Page

Preiser v. *Rodriguez*, 411 U.S. 475 (1973) 11, 19, 21
Procunier v. *Martinez*, 416 U.S. 396 (1974) 17, 18, 21
Randolph-Sheppard Vendors of America v. *Weinberger*, 795 F.2d 90 (D.C. Cir. 1986) 31
Renegotiation Bd. v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974) 13, 33
Ricci v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973) 33, 34
Scheuer v. *Rhodes*, 416 U.S. 232 (1974) 15
Schweiker v. *Chilicky*, 487 U.S. 412 (1988) 14, 23
Secret v. *Brierton*, 584 F.2d 823 (7th Cir. 1978) 22, 30
Turner v. *Safley*, 482 U.S. 78 (1987) 11, 17, 18
United States v. *Stanley*, 483 U.S. 669 (1987) 15
Watson v. *Arkansas Nat'l Guard*, 886 F.2d 1004 (8th Cir. 1989) 34
Weinberger v. *Salfi*, 422 U.S. 749 (1975) 17, 32
Whitley v. *Albers*, 475 U.S. 312 (1986) 15
Wilson v. *Seiter*, No. 89-7376 (June 17, 1991) 15

Constitution, statutes, regulations, and rules:

U.S. Const.:
Amend. I 36
Amend. IV 14
Amend. V 14
Amend. VIII 8, 14, 15
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.* 32
Federal Torts Claims Act, 28 U.S.C. 1346 ..... 3, 19
Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6972 32
18 U.S.C. 4001 16
18 U.S.C. 4001(b) 2, 3
18 U.S.C. 4001(b)(1) 2
18 U.S.C. 4001(b)(2) 2
18 U.S.C. 4042 ..... 2, 3, 16
18 U.S.C. 5003 7
28 U.S.C. 2672 19
42 U.S.C. 1983 ..... 12, 21, 23, 24, 25, 28, 34, 35
42 U.S.C. 1997e 12, 21, 23, 24, 25, 26, 27, 28, 35
42 U.S.C. 1997e(b)(2) 24

Regulations and rules—Continued: Page

28 C.F.R.:
Section 0.96(q) 3
Section 0.172 20
Section 14.1 *et seq.* 4
Section 40.1 *et seq.* 24
Section 40.6 26
Section 50.15(c)(2) 20
Section 542.10 *et seq.* 2, 3
Section 542.10 ..... 3, 38
Section 542.11(a)(3) 4, 5
Section 542.12 3
Section 542.13 30
Section 542.13(a) 4
Section 542.13(b) 4, 38
Section 542.13(c) 4, 37
Section 542.14 5
Section 542.15 ..... 5, 38
Section 543.30 19
Section 543.31 19
Sections 543.30-543.31 4
Sections 546.20-546.21 3
Fed. R. Civ. P. 12(b)(6) 22
Fed. R. Civ. P. 60(b) 9

Miscellaneous:
Bureau of Prisons, U.S. Dep't of Justice, Federal Prison System Program Statement No. 1330.7 (Oct. 12, 1979) 5, 6, 30, 37
Bureau of Prisons, U.S. Dep't of Justice, Policy Statement No. 2001.6A (1974) 6
42 Fed. Reg. 64,083 (1977) 3
44 Fed. Reg. 62,248 (1979) 4
Federal Courts Study Comm., Working Papers and Subcommittee Reports (1990) 26
Monaghan, *The Supreme Court 1974 Term, Foreward: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975) 14
Note, *Resolving Prisoners' Grievances Out of Court: 42 U.S.C. 1997e*, 104 Harv. L. Rev. 1309 (1991) 21, 24, 27

Miscellaneous—Continued: Page

Report of the Federal Courts Study Committee (1990) 26
S. Rep. No. 416, 96th Cong., 1st Sess. (1979) 24, 25

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OPINIONS BELOW

The decision of the court of appeals (J.A. 16-19) is reported at 914 F.2d 1411. The orders of the district court (J.A. 12-13 and 14-15) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1990. The petition for a writ of certiorari was granted on April 22, 1991. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Bureau of Prisons administrative remedy procedure for inmates, codified at 28 C.F.R. 542.10 *et seq.*, is reprinted in the Appendix to Petitioner's Brief at 1a-4a.

18 U.S.C. 4001(b) provides:

> (1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended, and the applicable regulations.
>
> (2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

18 U.S.C. 4042 provides, in pertinent part:

> Duties of Bureau of Prisons
>
> The Bureau of Prisons, under the direction of the Attorney General, shall—
>
> (1) have charge of the management and regulation of all Federal penal and correctional institutions;
>
> (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
>
> (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States;
>
> * * * * *

STATEMENT

1. The question in this case is whether inmates of federal correctional facilities must comply with the Bureau of Prisons' internal grievance procedures before initiating a lawsuit against prison officials for money damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Congress has authorized the Attorney General, under 18 U.S.C. 4001(b) and 4042, to provide for the management and regulation of the penal institutions within the federal prison system, and for the protection and discipline of the system's inmates. The Attorney General has delegated that authority to the Bureau of Prisons, see 28 C.F.R. 0.96(q), which has promulgated a four-stage procedure for formal review of prisoner grievances "relat[ing] to any aspect of * * * imprisonment."[1] 28 C.F.R. 542.10. See 28 C.F.R. 542.10 *et seq.*

[1] The BOP grievance regulations state that they do not apply to complaints involving "tort claims, Inmate Accident Compensation claims, Freedom of Information or Privacy Act requests, or complaints on behalf of other inmates." 28 C.F.R. 542.12. The BOP has construed the exemption for "tort claims" to refer to Federal Tort Claims Act (FTCA) claims, for which there is an alternative set of administrative procedures, not to *Bivens* claims, for which there is not. That interpretation is consistent with the administrative record, which makes clear that Section 542.12 was intended to exempt claims already covered by other regulations. The original proposed rules included an exemption for "claims under the Federal Tort Claims Act or the Claims for Inmate Injury Compensation under 18 U.S.C. 4126." See 42 Fed. Reg. 64,083 (1977); see also 28 C.F.R. 546.20 to 546.21 (regulations cover-

The grievance procedure applicable to this case, which has been in effect since 1979, see 44 Fed. Reg. 62,248 (1979), is structured to encourage the prompt investigation and resolution of prisoner grievances. Under BOP regulations, any inmate at a federal facility with a complaint relating to any aspect of his imprisonment must first raise his complaint informally with members of the prison staff, 28 C.F.R. 542.13(a), who must attempt to resolve the complaint. If an inmate is dissatisfied with the staff's response and wishes to pursue the issue further, a written complaint must be filed within 15 days of the date "on which the basis of the complaint occurred." The regulations provide, however, that an untimely filed complaint "shall" be accepted if the inmate has a "valid reason" for delay. Section 542.13(b). The regulations do not include any technical pleading requirements, and an inmate may obtain assistance from the prison staff or other inmates in preparing his complaint or appeal. Section 542.13(b). The regulations also provide for the confidential filing of "sensitive" complaints directly with the Regional Director, subject to the Director's consent. Section 542.13(c).

The filing of the inmate's written complaint triggers investigation and review of the grievance. First, the warden of the facility in which the prisoner is incarcerated is required to conduct an investigation into each complaint, Section 542.11(a)(3), and

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ing Inmate Injury Compensation); 28 C.F.R. 543.30 to 543.32 and 14.1 *et seq.* (regulations covering FTCA claims). In the final rule, exemptions were added for Freedom of Information Act and Privacy Act claims, because those claims "may be filed in accordance with Part 16 of 28 CFR." 44 Fed. Reg. 62,248 (1979).

must respond to the inmate within 15 days. Section 542.14.[2] If the inmate is not satisfied with the relief afforded, he then has 20 days to appeal to the Regional Director. The Regional Director is then required to conduct a second, independent investigation of the grievance. Section 542.11(a)(3). This investigation and response must be completed within 30 days. Section 542.15. If further review is still required, the inmate has 30 days within which to file an appeal to the General Counsel of the Bureau of Prisons. A third investigation must then be conducted by the General Counsel, culminating in a final response within 30 days. Sections 542.11(a)(3), 542.15. In the ordinary course, the grievance procedure will be completed in less than five months.[3]

The BOP provides the inmate with a copy of the administrative record, and encourages inmates to file the record with the court if judicial review is sought. Although BOP has not asserted that its findings are entitled to judicial deference or that collateral estoppel should apply, BOP has determined that the grievance system cannot effectively serve its intended

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[2] Federal Prison System Program Statement No. 1330.7 (Oct. 12, 1979) sets forth additional requirements: "complaints of staff misconduct should not be investigated by the staff member complained about"; responses to complaints must "be in writing"; and "the response should answer completely the complaint, be factual, but should contain no extraneous information." The regulations also provide for accelerated processing of "emergency" complaints, see 28 C.F.R. 542.14.

[3] The time allotted for an administrative response at each level can be doubled if the inmate is notified in writing. Section 542.14. A failure to answer the inmate's complaint within the time allotted is deemed to be "a denial at that level." Section 542.14.

function unless inmates are required to exhaust the administrative process before filing claims for equitable or monetary relief in federal court. The government, on behalf of *Bivens* defendants, has accordingly requested courts to dismiss claims brought by inmates who have bypassed the grievance procedure.[4]

2. Petitioner was sentenced in Connecticut on state criminal charges of burglary and larceny, and was incarcerated in the federal penitentiary at Leavenworth, Kansas, as a contract prisoner pursuant to

[4] Petitioner errs in suggesting (Pet. 12) that it is not now BOP policy to seek an exhaustion requirement from the courts. The passage on which petitioner relies—a sentence fragment taken out of context—is from a Policy Statement that was promulgated under a previous version of its administrative remedy procedures, before the adoption of the regulations in issue. The relevant section of Bureau of Prisons Policy Statement 2001.6A recites the steps of the administrative grievance and appeals process, and then, in a new paragraph, states that "An offender may, if he chooses, forward his complaint through the Prisoners' Mail Box or he may file his law suit directly with the appropriate court." This statement instructs prisoners on the mechanics of filing at different stages of the process.

The above-quoted excerpt continues: "However, courts frequently require evidence that administrative remedies have been exhausted before ruling on a complaint, and offenders should be so advised." Elsewhere, the Policy Statement says that, "[i]f dissatisfied with the response to his complaint and appeals, the offender is free to file suit in an appropriate court and attach documentary proof that he exhausted his administrative remedy." These comments hardly constitute a repudiation of an administrative exhaustion requirement. In any event, Policy Statement 2001.6A which was promulgated under regulations no longer in force, was superseded in 1979 by a new policy statement that does not contain the quoted passage. See U.S. Dep't of Justice Federal Prison System Program Statement 1330.7 (Oct. 12, 1979).

18 U.S.C. 5003. J.A. 5, 8. Bureau of Prisons records reflect that, on March 26, 1991, petitioner was transferred out of the federal prison at Leavenworth and was returned to the custody of the Connecticut Department of Corrections. See also Pet. Br. 3-4 n.2; Pet. Reply 3. While in custody, petitioner filed numerous *pro se* complaints in courts throughout the country challenging various aspects of his confinement.[5]

[5] See, *e.g.*, *McCarthy* v. *Warden Blevins*, No. TH89-42-C (S.D. Ind.) (filed Mar. 1, 1989) (claiming denial of medical treatment for his back ailment); *McCarthy* v. *Warden Henman*, No. 90-3302-R (D. Kan.) (filed Aug. 10, 1990) (claiming denial of medical treatment for psychiatric stress problems); *McCarthy* v. *Warden Henman*, No. 90-3334-R (D. Kan.) (filed Aug. 21, 1990) (claiming that petitioner was given inadequate medical treatment for his back ailment); *McCarthy* v. *United States Attorney General*, No. 291CV00436PCD (D. Conn.) (filed May 24, 1991) (alleging denial of adequate medical treatment). See also, complaints filed in the United States District Court for the Southern District of Indiana in *McCarthy* v. *Lopez*, No. TH-87-2-C; *McCarthy* v. *Blevins*, No. TH-87-7-C; *McCarthy* v. *Blevins*, No. TH-87-210-C; in the United States District Court for the Middle District of Pennsylvania in *McCarthy* v. *Keohane*, No. 88-1633; *McCarthy* v. *Gonzalez*, No. 88-1756; *McCarthy* v. *Keohane*, No. 88-1775; and *McCarthy* v. *United States*, No. 88-1943; in the United States District Court for the Central District of California in *McCarthy* v. *United States*, No. 89-6051; *McCarthy* v. *Rison*, No. 89-6052; *McCarthy* v. *Morris*, No. 89-6272; *McCarthy* v. *United States*, No. 89-6557; and *McCarthy* v. *United States*, No. 90-6036; and in the United States District Court for the District of Kansas in *McCarthy* v. *Henman*, No. 90-3122-R; *McCarthy* v. *Weider*, No. 90-3141-R; *McCarthy* v. *Henman*, No. 90-3228-R; *McCarthy* v. *Henman*, No. 90-3323-R; *McCarthy* v. *Henman*, No. 90-3334-R; *McCarthy* v. *Henman*, No. 90-3351-R; *McCarthy* v. *Henman*, No. 90-3353-R; *McCarthy* v. *Rison*, No. 91-3083-R; and *McCarthy* v. *Thompson*, No. 91-3141-R.

In the case at issue, petitioner filed suit against four prison employees—the hospital administrator, a psychologist and two physicians. The complaint alleged that the medical staff at Leavenworth violated the Eighth Amendment of the Constitution by exhibiting "deliberate indifference" to his "serious medical needs." [6]

The complaint alleged that several months after undergoing back surgery, petitioner began to experience chronic back pain and requested medication. J.A. 9. Although the complaint concedes that the prison medical staff provided petitioner with medications, he claims that they had an "insignificant" effect on his condition. Petitioner was accordingly "forced to purchase contraband drugs." *Ibid.* The complaint further asserted that petitioner had a "long history" of psychiatric problems related to his inability "to cope with stress," and that the failure of the medical staff to respond to his medical needs was causing "stress and violent reactions." *Id.* at 10. Finally, petitioner complained that the defendants should have transferred him to a single cell because

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[6] Petitioner simultaneously filed two complaints with the district court. One represented that petitioner had "begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to [his] imprisonment" and that petitioner had exhausted administrative remedies for the "facts relating to" his complaint. J.A. 2-3. A second complaint alleging the same facts stated that exhaustion was not required because petitioner was seeking "Money Damage Awards Only." J.A. 8. Both complaints were signed by petitioner on March 28, 1990, and filed on April 3, 1990, and the district court assigned Docket No. 90-3101-R to both. There is no dispute in this case, however, that petitioner did not exhaust the administrative grievance procedure for the claim in issue here. Pet. Br. 5 n.7.

pain-induced insomnia was causing conflict with his cellmate. *Id.* at 9. Based upon the allegations that the defendants "ignored" these requests, petitioner sought $300,000 in actual, compensatory, and punitive damages under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). J.A. 9-10. The complaint did not seek equitable relief.

3. On April 6, 1990, relying on *Brice* v. *Day*, 604 F.2d 664 (10th Cir. 1979), cert. denied, 444 U.S. 1086 (1980), the district court dismissed petitioner's complaint without prejudice because petitioner "failed to demonstrate his use of the administrative remedy provided by the Bureau of Prisons." J.A. 12. On April 16, 1990, petitioner filed a Motion For Relief From Judgment pursuant to Fed. R. Civ. P. 60(b). J.A. 1. The district court denied the motion on April 19, 1990, *id.* at 14-15, and petitioner appealed.

4. On September 20, 1990, the court of appeals upheld the district court's decision, J.A. 16-19. Relying on its prior decision in *Brice* v. *Day*, *supra*, the court ruled that a federal prisoner is required to exhaust administrative remedies before bringing a *Bivens* action, even where the sole relief sought is money damages. The exhaustion rule, the court said, "is not keyed to the type of relief sought, but to the need for preliminary fact-finding." J.A. 18. "*Brice* made clear," the court stated, that "administrative consideration is not to resolve constitutional issues nor to consider damages * * * but simply to develop a factual record to assist the district court in its review." *Id.* at 17.

The court of appeals declined to follow the decisions in *Muhammad* v. *Carlson*, 739 F. 2d 122 (3d Cir. 1984), and *Goar* v. *Civiletti*, 688 F. 2d 27 (6th

Cir. 1982), in which the courts held that a prisoner need not exhaust the Bureau of Prisons' administrative grievance procedures before filing a *Bivens* action for monetary relief. Instead, the court reasoned that because *Bivens* actions are a " 'creation of the judiciary' * * * it follows that courts may, and indeed must, establish reasonable requirements for bringing such actions." J.A. 18. The court endorsed the Fifth Circuit's conclusion in *Hessbrook* v. *Lennon*, 777 F.2d 999, 1007 (1985), that "a broad exhaustion requirement is particularly appropriate in cases involving federal prisoner complaints against prison officials relating to their * * * treatment during confinement." J.A. 18. Although assuming that "the administrative apparatus could not award money damages," [7] the court observed that "administrative consideration of the possibility of corrective action and a record [may aid] a court in measuring liability and determining the *extent* of the damages." *Ibid.* (citing *Goar* v. *Civiletti*, 688 F.2d at 29).

The court noted that petitioner did not challenge the district court's finding that he failed to make use of "the [available] administrative remedy process." J.A. 19. Noting that "preliminary fact-finding is necessary * * * to determine whether [petitioner] has a possible *Bivens* cause of action," the court of appeals affirmed the order of the district court dismissing petitioner's claim without prejudice. *Ibid.*

SUMMARY OF ARGUMENT

A. This Court has recognized that its judicial "power to grant relief that is not expressly authorized by statute" under *Bivens* v. *Six Unknown*

[7] But see discussion, *infra*, at pp. 19-20.

Named Agents of the Federal Bureau of Narcotics, should not be exercised in a manner that will infringe on other substantial governmental interests. *Bush* v. *Lucas*, 462 U.S. 367, 373 (1983). The Court has adopted reasonable limitations on the scope of the *Bivens* remedy where (1) the limitation promotes the effective functioning of the coordinate branches of government; (2) the limitation serves to accommodate articulated congressional policies; and (3) the litigant retains effective rights of redress for constitutional injuries. These considerations support the adoption of an exhaustion rule requiring inmates of federal correctional facilities to utilize the BOP's grievance process before filing judicial actions under *Bivens*.

B. Exhaustion of the BOP's grievance process promotes the effective functioning of the federal correctional system and the courts. The Court has recognized that BOP must be the "primary arbiter[] of what constitutes the best solution" to problems of prison administration. *Turner* v. *Safley*, 482 U.S. 78, 89 (1987). The requirement that inmates first present complaints to BOP gives prison officials the opportunity to consider corrective action before courts intervene. By promoting internal resolution of disputes, exhaustion minimizes the burden of responding to "boundless" prisoner complaints, see *Preiser* v. *Rodriguez*, 411 U.S. 475, 492 (1973), and benefits the court system by reducing the number of claims requiring judicial attention.

Contrary to petitioner's contention, complaints giving rise to pure claims for money damages can often be resolved at the administrative level, because BOP has authority to settle monetary claims before inmates resort to judicial action. Further, by some-

times permitting summary judgment disposition without resort to civil discovery, the administrative record developed in the course of the BOP procedure reduces the "peculiarly disruptive" effects of civil discovery on prison operations, see *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817 (1982), and assists the courts in the fair and efficient handling of *Bivens* claims.

C. Exhaustion should be required here "in the light of relevant policy determinations made by the Congress." *Bush* v. *Lucas*, 462 U.S. at 373. Pursuant to 42 U.S.C. 1997e, state prison inmates may be compelled to exhaust prison grievance procedures, regardless of whether those procedures provide for monetary relief, before filing claims against state officials under 42 U.S.C. 1983 for violations of constitutional rights. Section 1997e reflects Congress's judgment that exhaustion of state prisoners' constitutional claims is justified by considerations of policy, including the need to reduce the burden on the courts and to "improve prison conditions." *Patsy* v. *Board of Regents*, 457 U.S. 496, 508 (1982). It would make "no sense" to conclude that exhaustion of federal prisoners' claims does not advance similar policies. *Butz* v. *Economou*, 438 U.S. 478, 500-501 (1978).

D. Exhaustion of BOP grievance procedures does not impair the effectiveness of the *Bivens* remedy. The compensatory and deterrent effects of *Bivens* actions are preserved, since an inmate may obtain *de novo* judicial review and full compensation for meritorious claims, and federal officials are exposed to personal financial liability.

This Court has never ruled that exhaustion can only be required where the relief afforded at the administrative level serves as a complete substitute for

relief subsequently available in court. The nature of the relief that may be obtained at the administrative level is simply one factor considered by the courts in construing Congress's intent under the statutory schemes at issue. See, *e.g.*, *Coit Indep. Joint Venture* v. *FSLIC*, 489 U.S. 561, 586-587 (1989). This Court accordingly has required exhaustion of "inadequate" administrative remedies where necessary to further congressional policies. See, *e.g.*, *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 20 (1974). Moreover, in determining how to exercise its "power [under *Bivens*] to grant relief that is not expressly authorized by Congress," the Court has held that it should defer to an administrative scheme even where it could "not provide complete relief for the plaintiff." *Bush* v. *Lucas*, 462 U.S. at 373, 388.

ARGUMENT

PETITIONER MUST EXHAUST ADMINISTRATIVE GRIEVANCE PROCEDURES ESTABLISHED BY THE FEDERAL BUREAU OF PRISONS BEFORE FILING A *BIVENS* CLAIM FOR MONEY DAMAGES

A. This Court Can Impose Reasonable Limitations On The Exercise Of Its Power Under *Bivens* In Order To Promote The Effective Functioning Of Government Or To Accommodate Congressional Policy

In *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. at 397, this Court "established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official." *Butz* v. *Economou*, 438 U.S. at 504. This Court has expressly recognized the right to sue federal officers for money damages for violations of

rights under the Fourth Amendment, see *Bivens*, *supra*, the Fifth Amendment, see *Davis* v. *Passman*, 442 U.S. 228 (1979), and the Eighth Amendment, see *Estelle* v. *Gamble*, 429 U.S. 97 (1976). Acknowledging that "*Bivens* actions are a creation of federal law," and that "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules," *Carlson* v. *Green*, 446 U.S. 14, 23 (1980), the Court has not hesitated to fashion common law guidelines delimiting the federal courts' powers to redress constitutional torts. Accordingly, the Court has developed a body of doctrine concerning types of damages, compensable injuries, the degree of intent required to establish a cause of action, and the availability of immunity defenses.[8]

For example, the Court has held that a *Bivens* action will lie only if "there are available no other alternative forms of judicial relief." *Davis* v. *Passman*, 442 U.S. at 245. A *Bivens* claim is defeated if Congress intended to provide an effective alternative remedy. *Carlson* v. *Green*, 446 U.S. at 18-19; see also *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988). Even if Congress has not provided such relief, the courts may refuse to entertain a *Bivens* action where "special factors counsel[] hesitation." *Carlson* v. *Green*, 446 U.S. at 18 (citations omitted.) See, *e.g.*, *Bush* v. *Lucas*, 462 U.S. at 388 (comprehensive structure of federal civil service system is "special factor" counseling against "augment[ation] by creation of new judicial remedy"); *Chappell* v. *Wallace*, 462 U.S. 296, 298-305 (1983) ("unique disciplinary structure

[8] See, e.g., Monaghan, *The Supreme Court 1974 Term, Foreward: Constitutional Common Law*, 89 Harv. L. Rev. 1, 23-24 (1975) (discussing doctrine governing *Bivens* actions as judge-made common law).

of military establishment" precludes *Bivens* remedy); see also *United States* v. *Stanley*, 483 U.S. 669 (1987). The Court has also modified the scope of the *Bivens* remedy to allow the Executive Branch to function effectively. Mindful of "the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability," *Scheuer* v. *Rhodes*, 416 U.S. 232, 239 (1974), the Court has fashioned immunity doctrine in ways that limit the circumstances under which a plaintiff may recover under *Bivens*. See, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. at 814; *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985). Finally, the Court has held that a *Bivens* remedy for a violation of the Eighth Amendment is unavailable unless defendant prison officials are shown to possess "the requisite culpable state of mind." *Wilson* v. *Seiter*, No. 89-7376 (June 17, 1991), slip op. 2; see also *Whitley* v. *Albers*, 475 U.S. 312, 319 (1986); *Estelle* v. *Gamble*, 429 U.S. at 106.

These decisions establish a fundamental point concerning the Court's proper role in *Bivens* jurisprudence—that the Court will adopt reasonable limitations on its own exercise of "power to grant relief that is not expressly authorized by statute" when necessary to accommodate either the effective functioning of government or articulated congressional policy. See *Bush* v. *Lucas*, 462 U.S. at 373 (declining to exercise its power under *Bivens* in order to accommodate congressional policy under the civil service laws); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 745 (1982) (precluding *Bivens* remedy in action against the President to prevent unwarranted interference with executive functions); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982) (expanding the scope of qualified immunity in *Bivens* actions to reduce the disruptive impact of litigation on federal functions). The

Court's imposition of these limitations on the scope of the *Bivens* remedy has been "guided" and "informed" by "concerns of public policy," "federal statutes," and "common law." *Nixon* v. *Fitzgerald*, 457 U.S. at 747.

Application of these principles should lead this Court to conclude that requiring inmates to exhaust the Bureau of Prisons' grievance procedures is a reasonable and appropriate limitation on *Bivens*: exhaustion fosters substantial interests of the courts and the federal system, in conformance with articulated congressional policy, while still enabling inmates to seek vindication for alleged violations of constitutional rights encompassed by *Bivens*.

B. Exhaustion Of The Bureau Of Prisons' Grievance Procedure Is Needed To Promote The Effective Functioning Of The Prisons And The Courts

As this Court has recognized, a party is ordinarily required to exhaust available administrative remedies before seeking relief in federal court. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1983). Courts "may impose [an exhaustion] requirement even where Congress has not expressly so provided" to promote the effective functioning of federal agencies. *Patsy* v. *Board of Regents*, 457 U.S. at 501; see also *Coit Indep. Joint Venture* v. *FSLIC*, 489 U.S. at 583-585 (exhaustion of FSLIC administrative remedies prior to filing suit is appropriate means to carry out FSLIC's statutory responsibility for liquidating the assets of insolvent institutions); *McKart* v. *United States*, 395 U.S. 185, 193-195 (1969); *McGee* v. *United States*, 402 U.S. 479, 483-485 & n.6 (1971).

1. Acting pursuant to its responsibility for the "control and management" of federal penal and correctional institutions, 18 U.S.C. 4001, and the "protection and discipline" of its inmates, 18 U.S.C. 4042,

BOP has established internal grievance procedures, and has also sought imposition of an exhaustion requirement. This position is based upon BOP's determination that, regardless of whether the inmate seeks monetary damages or injunctive relief, exhaustion will promote use of the grievance process, which will, in turn, foster more effective management and better prison conditions. Requiring a prisoner to exhaust administrative remedies before bringing a *Bivens* action provides many benefits associated with prior administrative consideration. See, *e.g.*, *McKart* v. *United States*, 395 U.S. at 193-195; *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1979). Indeed, petitioner does not even appear to contest the fact that exhaustion of all claims advances fundamental interests of prison administration. Pet. Br. 14.

The interests that justify exhaustion under this Court's precedent are plainly well served by applying the doctrine here. First, as this Court has acknowledged, prison authorities are in the best position to investigate and evaluate prisoner complaints in the first instance, and to determine what action should be taken. See *Procunier* v. *Martinez*, 416 U.S. 396, 405 n.9 (1974) (courts are especially "ill suited to act as the front-line agencies for the consideration and resolution of the infinite variety of prisoner complaints."); *Turner* v. *Safley*, 482 U.S. at 89 (prison authorities are "the primary arbiters of what constitutes the best solution" to problems of prison administration and are in the best position to implement such solutions.). With regard to matters—such as the proper response to prisoner grievances—that fall squarely within BOP's expertise, "separation of powers concerns counsel a policy of judicial restraint," *Turner* v. *Safley*, 482 U.S. at 85, and deference to the agency's judgment is in order. See, *e.g.*,

Bell v. *Wolfish*, 441 U.S. 520, 547 n.29 (1979) ("courts should defer to the informed discretion of prison administrators because the realities of running a corrections institution are complex and difficult, the courts are ill equipped to deal with these problems, and the management of these facilities is confided to the Executive and Legislative Branches, not to the Judicial Branch.").[9] Thus, it is entirely appropriate for courts to exercise jurisdiction only after the agency has had the initial opportunity to apply its expertise to problems discovered through the grievance process.

Second, exhaustion of BOP procedures ensures that dangerous conditions or abusive practices will be brought to the attention of responsible officials promptly so that the facts can be investigated and corrective action can be implemented immediately by the agency. The availability of an expeditious process is critical in the volatile setting of a prison.

Third, the opportunity for internal resolution of disputes promotes the potential for effective communication between inmates and the prison staff, and avoids the adversarial frictions engendered by confrontations in the judicial system. In addition, as the court of appeals suggested in *Brice* v. *Day*, 604 F.2d at 666-667, institutional lines of authority over prison staff and inmates are undermined when prisoners are not required to "go through the existing machinery

[9] See also *Turner* v. *Safley*, 482 U.S. at 84-85 ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977); *Procunier* v. *Martinez*, 416 U.S. 396 (1974); *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Hudson* v. *Palmer*, 468 U.S. 517, 527 (1984).

for investigation and resolution, or recommendation to higher authority," but are permitted an "immediate confrontation with the guards and supervisors outside the prison and in the court room." *Id.* at 667.

Fourth, the opportunity for internal resolution of grievances minimizes the burdens imposed on the prison if it is required to respond to every inmate complaint. These burdens are not insubstantial. As this Court recognized in *Preiser* v. *Rodriquez*, 411 U.S. at 492, the potential for claims against prison officials is "boundless" because, "[w]hat for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State." Contrary to petitioner's suggestion, this consideration is applicable to claims for money damages as well as to those seeking corrective action.

It is reasonable to anticipate that some prisoner complaints seeking money damages may be resolved through the grievance process, thereby obviating the need for judicial intervention. This will occur for a variety of different reasons: an inmate may conclude, based upon facts disclosed in the response to his complaint, that he does not have a basis to seek judicial relief; an inmate may determine that he is satisfied with corrective action taken by prison officials; or the Bureau of Prisons may exercise its authority to pay money damages to the inmate in settlement of his potential claim for relief.

BOP and Justice Department officials are authorized to settle or compromise claims against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346—including administrative claims—by the payment of monetary compensation. See 28 C.F.R. 543.30, 543.31; see also 28 U.S.C. 2672 (authorizing the settlement of tort claims against the

United States); 28 C.F.R. 0.172 (same). According to BOP, the agency has invoked its FTCA settlement authority to pay compensation to prisoners with claims that could be pursued in court under either *Bivens* or the FTCA. See, *e.g.*, *Carlson* v. *Green*, 446 U.S. at 19-20 (*Bivens* and the FTCA provide overlapping and complementary remedies "for the same type of conduct"); see also *Hessbrook* v. *Lennon*, 777 F.2d at 1001. These claims come to the agency's attention through the grievance process before the prisoner has filed a lawsuit and elected the theory under which he will proceed in court.[10] In short, exhaustion of monetary claims can avoid needless litigation.

Finally, even where litigation is not averted, the development of a factual record under BOP procedures minimizes the "peculiarly disruptive" effect of discovery on the agency. *Harlow* v. *Fitzgerald*, 457 U.S. at 817. In *Harlow*, this Court found that the disruptions of civil discovery in *Bivens* actions threaten "effective government." *Ibid.* The Court accordingly expanded the scope of the qualified immunity bar to the *Bivens* remedy so as to "permit the resolution of many insubstantial claims on summary judgment." *Id.* at 818. The *Harlow* considerations have even greater force in the context of this

[10] The Department of Justice (which includes the Bureau of Prisons) also has authority "to settle or compromise a personal damages claim against its employees by the payment of available funds at any time, provided that the alleged conduct giving rise to the personal damages claim was taken within the scope of employment, and that such settlement or compromise is in the interest of the United States." 28 C.F.R. 50.15(c)(2). This regulation empowers the Attorney General, where appropriate, to pay compensation in the small class of cases in which *Bivens* provides the sole avenue of relief.

case, where inmates can and do invoke litigation and discovery against prison officials for the purpose of "harassment and intimidation." *Cleavinger* v. *Saxner*, 474 U.S. 193, 203 (1985).

2. Completion of the grievance process by *pro se* prisoners also promotes judicial efficiency. This Court has expressed concern that "the capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase of frivolous prisoner complaints." *Procunier* v. *Martinez*, 416 U.S. at 405 n.9; see also *Preiser* v. *Rodriguez*, 411 U.S. at 492. Requiring exhaustion of BOP grievance procedures helps to address this concern in several important respects.

First, as already discussed, the grievance process can and does result in a reduction in the number of claims filed in federal court.[11] Second, an administrative record can be employed by the litigants and the court itself to facilitate fair and efficient handling of the claims. As the Seventh Circuit has observed, "[b]ecause the vast majority of [prisoner] cases are filed without the benefit of formal legal assistance, judges and law clerks expend substantial time and energy analyzing these *pro se* complaints, which are held to less stringent standards than formal pleadings drafted by lawyers, to determine

[11] Indeed, there is evidence that the use of state prison grievance procedures following the enactment of 42 U.S.C. 1997e, discussed *infra*, has resulted in a decrease in prisoners' Section 1983 claims. See Note, *Resolving Prisoners' Grievances Out of Court: 42 U.S.C. 1997e*, 104 Harv. L. Rev. 1309, 1312-1316 (1991) [hereinafter *Resolving Prisoners' Grievances*]. See also *Martin* v. *Catalanotto*, 895 F.2d 1040, 1042 (5th Cir. 1991) (South Carolina experienced a 33% decrease in Section 1983 suits after the adoption of an administrative remedy under Section 1997e).

whether 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Secret* v. *Brierton*, 584 F. 2d 823, 829 (7th Cir. 1978) (quoting *Haines* v. *Kerner*, 404 U.S. 519, 520-521 (1972) (per curiam)).

Although, as petitioner observes, "the inmate is not bound" by the facts "determined in the grievance process," Br. 19 n.19, the development of an administrative record may nevertheless aid the court in determining whether an otherwise deficient pleading could potentially be reformulated to state a meritorious claim. In those circumstances, the court can attempt to ensure that the inmate is afforded appropriate assistance—for example, appointment of *pro bono* counsel—in lieu of dismissing the claim under Federal Rule of Civil Procedure 12(b)(6).

In addition, the grievance procedure can improve the clarity of the inmate's complaint. If an inmate has been required to explain the nature of his complaint to prison officials, and has been afforded a corresponding opportunity to learn the factual basis for the prison's denial of his claim before filing in federal court, "his complaint * * * will be more refined and the pertinent issues will be more sharply drawn into focus." *Secret* v. *Brierton*, 584 F.2d at 829. This can, in turn, enhance the district court's ability to determine whether a prisoner has a legitimate *Bivens* action at all, since only a limited category of complaints can even state a claim for relief under *Bivens*.

Even where the administrative record does not materially aid the court with the disposition of the complaint under Rule 12(b)(6), it will still serve to aid the litigants and the court in identifying undisputed

facts so that summary judgment issues can be resolved prior to discovery. Petitioner's complaint provides an excellent example of how an administrative record would be important. In a *Bivens* action based upon allegations of inadequate medical care, a prisoner must prove "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle* v. *Gamble*, 429 U.S. at 106. The grievance process can provide precise information on the nature of petitioner's medical problems and treatment. Such facts will often be uncontested, and will demonstrate without need for further factfinding that the course of treatment could not support an award of damages under *Bivens* as a matter of law.

C. Congress Has Articulated A Policy Favoring Exhaustion Of Prison Grievance Procedures Prior To Filing Constitutional Claims Against Government Employees

Bush v. *Lucas*, *supra*, and *Schweiker* v. *Chilicky*, *supra*, establish that this Court will impose limits on the availability of a *Bivens* remedy where such limits are appropriate in light of relevant—but not controlling—congressional policies. As set forth in *Bush*, 462 U.S. at 373, this Court has the "power to grant relief that is not expressly authorized by statute" but "such power is to be exercised in the light of relevant policy determinations made by Congress." This rule of decision strongly supports adoption of an exhaustion limitation for *Bivens* actions brought by inmates of federal correctional facilities.

1. In response to this Court's decisions holding that exhaustion of administrative remedies is not required prior to the filing of constitutional claims against state officials under 42 U.S.C. 1983, Congress enacted 42 U.S.C. 1997e. See *Patsy* v. *Board of Regents*, 457 U.S. at 508-509. This provision permits

federal district courts to compel prisoners filing Section 1983 claims to exhaust a state prison grievance process.[12] As this Court found in *Patsy*, 457 U.S. at 508, Congress determined that it was necessary to "carve out" prisoner claims from the "no exhaustion rule" under Section 1983 in order to "improve prison conditions."

The legislative history reveals that the policy considerations that led to enactment of Section 1997e are identical to those that support the BOP regulation in this case. Congress found that exhaustion of prison grievance procedures would

> make an important contribution toward reducing court backlog in many districts. The almost 10,000 prisoner suits brought to court in 1978 are swamping our judges. Many of these complaints are pro se and often poorly drafted in terms of presenting the problem in a legal context. Requiring the exhaustion of in-prison grievances should resolve some cases thereby reducing the total number and help frame the issue in the remaining cases so as to make them ready for expeditious court consideration.

S. Rep. No. 416, 96th Cong., 1st Sess. 34 (1979). Congress also found that the presentation of complaints to prison authorities through established

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[12] Section 1997e(b)(2) of the Act sets forth minimum standards for state prison grievance procedures. The determination that a plan complies with the statutory standards is made either by the Department of Justice under regulations promulgated by the Attorney General, see 28 C.F.R. 40.1 *et seq.*, or by a district court. See also *Patsy* v. *Board of Regents*, 457 U.S. at 507-512. (discussing Section 1997e); *Resolving Prisoners' Grievances*, *supra*, 104 Harv. L. Rev. at 1312-1316.

channels would encourage greater institutional responsiveness and a higher level of prisoner satisfaction. See S. Rep. No. 416, *supra*, at 34 (state grievance procedures encourage "resolution of problems by the persons involved in prison administration. This should help to develop a sensitivity that may have been otherwise lacking."). In addition, Congress acted to help reduce the ever increasing "burden on the federal courts by diverting certain prisoner petitions back through state and local institutions and also to encourage the States to develop appropriate grievance procedures." *Patsy*, 457 U.S. at 509.

2. Petitioner contends that Section 1997e does not support the BOP position in this case because Congress conditioned the exhaustion requirement on the availability of a "plain, speedy, and effective administrative remedy," and that a remedy that does not provide for payment of money damages cannot meet this standard. Pet. Br. 14-15. But, as we have already shown, the BOP process can result in the payment of money. Moreover, state grievance procedures that do not provide monetary relief have nevertheless been considered to be "effective" within the meaning of Section 1997e where, as here, they serve the interests of the penal system, the litigants, and the courts.

In *Martin* v. *Catalanotto*, 895 F.2d 1040, 1042 (1990), the Fifth Circuit held that Section 1997e did not excuse a prisoner seeking only money damages under Section 1983 from exhausting state grievance procedures that did not expressly provide for monetary relief. As the court explained, "the reality is that underlying many prisoner suits for money damages is a complaint about prison conditions, conditions which can be remedied through the grievance procedure." Similarly, the Attorney General's regulations implementing Section 1997e require state

grievance procedures under Section 1997e to "afford a successful grievant a meaningful remedy," 28 C.F.R. 40.6, but the Department of Justice has never construed this regulation to require state grievance procedures to make provision for the award of monetary relief, and has never disapproved a state plan under Section 1997e for failure to provide for such an award.

Petitioner also maintains that it would be anomalous for federal courts to demand exhaustion of BOP procedures that omit features mandated by Congress for state systems under 42 U.S.C. 1997e—in particular, "safeguards to avoid reprisals," and "an advisory role for employees and inmates." Br. 13 n.13. Petitioner misses the mark; BOP procedures do safeguard against reprisals by permitting "sensitive" cases to be filed with the Regional Director. In adidtion, the availability of review of all decisions by BOP officials outside the particular prison itself serves to minimize the risk that reprisals will escape detection. There is thus no reason to believe that BOP procedures do not conform to these requirements in practice.

In addition, a grievance process that lacks some features that Congress chose to incorporate through Section 1997e is not necessarily ineffective or fundamentally unfair. The Federal Courts Study Committee, which was created by Congress in 1989 to study the federal court workload, concluded that systems that do not fulfill all the requirements of Section 1997e may nevertheless be "fair and effective." *Report of the Federal Courts Study Committee* 50 (1990). In explaining this conclusion, see *Federal Courts Study Comm., Working Papers and Subcommittee Reports* 395-396 (1990) (emphasis added)

(quoted in *Resolving Prisoners' Grievances, supra*, 104 Harv. L. Rev. at 1322), the subcommittee created to study Section 1997e stated:

> Prison administrative remedies work primarily for three reasons. First, they inform prison officials of problems the officials might not otherwise discover, enabling them to respond before litigation. Second, they reduce prisoner dissatisfaction by allowing prisoners to air their complaints. Third, they tend to be less adversarial, and so more effective, than litigation—which seriously disadvantages the (invariably *pro se*) inmate. *None of these advantages is peculiar to a process that incorporates the particular requirements of section 1997e(b)(2).*

3. Congress's failure to enact a provision parallel to Section 1997e for federal prisoners cannot be seen as an expression of legislative intent to permit *Bivens* claims to proceed without exhaustion. Section 1997e was adopted as part of a more comprehensive statute addressing the enforcement of civil rights statutes enacted by Congress. See *Patsy*, 457 U.S. at 508. In this context, it is hardly surprising that Congress did not draft Section 1997e to encompass exhaustion of claims against federal officers, which were not even authorized by Congress in the first instance.

Moreover, it would be inconsistent with the logic of the Court's decision in *Butz* v. *Economou*, 438 U.S. at 500-501, to infer that Congress intended to foreclose exhaustion of grievance procedures for federal prisoners, since the public policies justifying analogous procedures in the state context are equally applicable to federal claims. In *Butz*, the Court held that the "public policy" considerations governing the immunity of federal officials under *Bivens* generaliy

match those underlying the immunity afforded state officials under Section 1983, observing that "constitutional injuries" actionable under both remedies are of equal magnitude. Just as this Court saw "no sense" in developing a doctrine of immunity under *Bivens* that would "protect[] the warden of a federal prison where the warden of a state prison would be vulnerable," it similarly makes "no sense" to adopt a rule of exhaustion that would "protect[] the warden of a [state] prison where the warden of a [federal] prison would be vulnerable." 438 U.S. at 501. There is no reason to assume that Congress thought otherwise.

D. The Bureau of Prisons' Grievance Process Does Not Impair The Effectiveness Of The *Bivens* Remedy

1. In determining whether to limit its exercise of judicial power under *Bivens*, this Court has invariably given consideration to the impact its ruling will have on the litigants' ability to obtain redress for injuries of constitutional dimension. *Bush* v. *Lucas*, 462 U.S. at 386; *Carlson* v. *Green*, 446 U.S. at 22. Similarly, when the Court has been requested to condition the availability of other causes of action on exhaustion of an administrative scheme, it has also sought to determine the extent to which exhaustion would impair the litigant's judicial right of action. See, *e.g.*, *Coit Indep. Joint Venture* v. *FSLIC*, *supra*. Where requiring use of administrative processes furthers substantial governmental interests without sacrificing the litigants' rights to seek redress, such requirements have been found to be reasonable. *Ibid.*

Because exhaustion in this context advances congressional policies articulated in Section 1997e and

allows prisoners who comply with prison procedures to take full advantage of the *Bivens* remedy, it is unnecessary for this Court to undertake an independent balancing of competing interests. *Bush* v. *Lucas*, 462 U.S. at 373. If this Court were to undertake the task, it is nevertheless apparent that exhaustion is a reasonable limitation on this Court's exercise of its power to adjudicate constitutional claims, since the administrative requirement does not significantly impair prisoners' rights to seek redress under *Bivens*. The BOP proceedings are short in duration, and the inmate can obtain *de novo* adjudication of his claim at the conclusion of the process.[13] See *Coit Indep.*

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[13] Initially, petitioner argued that BOP's administrative procedure was time-consuming and that its application may result in a failure to satisfy the statute of limitations for *Bivens* actions. Pet. 13-14. This argument is untenable, since even if each fixed extension of time permitted by the grievance regulations is granted, the review process is completed in about seven months (215 days), which creates no statute of limitations problems. See, e.g., *Johnston* v. *Horne*, 875 F.2d 1415, 1424 (9th Cir. 1989) (three-year statute of limitations for *Bivens* action borrowed from Washington's residual limitations period); *Chin* v. *Bowen*, 833 F.2d 21, 22-24 (2d Cir. 1987) (applying New York's three-year limitations period for personal injury actions); *McSurely* v. *Hutchison*, 823 F.2d 1002, 1005 (6th Cir. 1987) (applying Kentucky's one-year limitations period for personal injury actions), cert. denied, 485 U.S. 934 (1988).

In this respect, this case is unlike *Coit*, *supra*, in which the Court held that an administrative claims procedure should not be enforced because it allowed the reviewing agency "to delay the administrative processing of claims indefinitely, denying a litigant its day in court, while the statute of limitations runs." In *Coit*, timely compliance with the exhaustion requirement could result in the loss of all judicial relief. Here, timely compliance with the BOP grievance procedures does not threaten to deprive the prisoner of the full measure of relief available

Joint Venture, 489 U.S. at 584-585 (procedure imposing reasonable time limits on administrative decision-making can be required without specific congressional authorization because a short delay would not unfairly prejudice the litigant.)[14]

Moreover, the purposes of the *Bivens* remedy identified in *Carlson* v. *Green*, *supra*—compensation and deterrence—are achieved regardless of whether an inmate is first required to present his claim to prison authorities. *Bivens* actions foster deterrence because the "individual official faces personal financial liability," 446 U.S. at 21. An exhaustion requirement does not eliminate that risk. The procedure in issue permits *de novo* judicial consideration, and thus does not compromise the inmate's right to full compensation for meritorious claims, including punitive damages.

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through a subsequent court action. The resulting delay is modest, and only briefly postpones a judicial determination. See *Muhammad* v. *Carlson*, 739 F.2d at 124. In any event, because the time necessary for the district court to render its decision may be reduced, the benefits of administrative consideration "mitigate[] the modest delay inherent in pursuing the grievance process." *Secret* v. *Brierton*, 584 F.2d at 829.

[14] In his brief, petitioner now argues that the "short time deadlines" for filing and appeal are unfair. Br. 8. However, those time limits benefit inmates by bringing prisoner complaints to the attention of authorities quickly, thereby encouraging the prompt resolution of complaints. Petitioner does not point to any obstacles to inmates' meeting the relevant filing deadlines, nor could he. Filing is accomplished by submission of a simple and readily available form to a prison staff member. Prisoners may receive assistance from prison staff or other inmates in preparing complaints and appeals, and extensions "shall be" granted if the inmate "demonstrates a valid reason for delay." See 28 C.F.R. 542.13; Federal Prison System Program Statement 1330.7, at 2.

In other cases, this Court has determined that it was reasonable to adopt far more stringent limitations on the *Bivens* remedy based upon similar governmental interests. See pp. 13-15, *supra*. Petitioner nevertheless contends that exhaustion cannot be reasonable here because the grievance procedure at issue does not provide expressly for monetary remedies, and the BOP's fact finding procedures lack the procedural safeguards of adjudicatory hearings. Neither concern, however, abrogates an inmate's right to recover under *Bivens*, and neither is sufficient to defeat the institutional interests fostered by exhaustion.

2. Petitioner's assertion that exhaustion is unreasonable because the grievance procedure offers him "no form of compensation for past injuries", and that he has "no chance of winning the relief" he seeks is simply not accurate. Pet. Br. 13. As previously described, the Bureau of Prisons has authority to settle inmates' tort claims, and that authority has been exercised in the course of an administrative grievance procedure. See, *Randolph-Sheppard Vendors of America* v. *Weinberger*, 795 F.2d 90, 107 (D.C. Cir. 1986) ("When determining whether a remedy will be adequate, a court must consider all potential methods at the agency's disposal to remedy a violation if one is found.").

In any event, petitioner's argument rests upon the erroneous premise that, because the BOP grievance regulations do not expressly provide for monetary relief, the process cannot be reasonable or "adequate" as a matter of law. Pet. Br. 11-12. This Court has never ruled, however, that exhaustion can only be required where the relief afforded at the administrative level serves as a complete substitute for relief subsequently available in court. Instead, the Court has examined

a range of criteria to determine whether exhaustion would advance congressional policies underlying the respective statutory schemes. See *Bowen* v. *City of New York*, 476 U.S. 467, 484 (1986) ("[A]pplication of the exhaustion doctrine is 'intensely practical,'" quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 311 n.11 (1976)); *Patsy*, 457 U.S. at 502 n.4. ("In determining whether exhaustion of federal administrative remedies is required, courts generally focus on the role Congress has assigned to the relevant federal agency, and tailor the exhaustion rule to fit the particular administrative scheme created by Congress.") See also *McKart* v. *United States*, 395 U.S. at 193 (courts should apply the exhaustion doctrine with "an understanding of its purposes and of the particular administrative scheme involved."); accord *Weinberger* v. *Salfi*, 422 U.S. at 765. As these precedents indicate, exhaustion can serve a variety of institutional interests, and the litigant's interest in immediate access to complete relief is only one factor in the exhaustion calculus.

Congress has often conditioned the availability of judicial remedies on the satisfaction of administrative prerequisites that do not provide full relief to the litigant. See, *e.g.*, Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6972 (statutory requirement of 60 days' notice to the EPA as a prerequisite to the filing of a citizen's suit to enforce the statute); *Hallstrom* v. *Tillamook*, 110 S. Ct. 304 (1989) (upholding RCRA notification requirement). See also, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (requiring an aggrieved individual to file a claim of discrimination with the EEOC before filing a civil action in federal court,

even though EEOC has no power to grant back pay or reinstatement).[15]

Similarly, this Court and others have sometimes required administrative exhaustion in the service of important congressional policies where the administrative scheme could not provide the relief sought. For example, in *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 20 (1974), the Court held that a contractor must comply with administrative procedures for a contract renegotiation before filing a lawsuit under the Freedom of Information Act to obtain government information relating to the contract. Despite the fact that the contractor alleged that he could not obtain the requested information through administrative channels, the Court concluded that the purposes of the renegotiation procedures would be subverted by premature judicial interference.

Similarly, in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 307 (1973), the Court ruled that an antitrust suit could not proceed until the Commodity Exchange Commission had passed on the validity of the respondent's conduct under the Commodity Exchange Act, even though the Commission was powerless to remedy antitrust violations. The Court explained that prior agency adjudication was

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[15] To be sure, EEOC may occasionally persuade a private employer to provide back pay or reinstatement to the complaining employee, thereby resulting in relief similar to that which the employee might have obtained in court. In that regard, however, the Title VII scheme is, if anything, less "adequate" than the BOP grievance process here, since EEOC can only attempt to persuade private employers to make their employees whole, but the government has the power directly to compensate prisoners for tortious conduct at the administrative level. See discussion, *infra*, at pp. 19-20.

likely to be "a material aid" in deciding the antitrust question, which turned on preliminary issues of fact and law "that should be dealt with in the first instance by those especially familiar with the customs and practices of the industry and of the unique marketplace involved in th[e] case." 409 U.S. at 305. See also *id.* at 305-306 (noting "the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern."). See also *Watson* v. *Arkansas Nat'l Guard*, 886 F.2d 1004 (8th Cir. 1989) (holding that a Reservist must exhaust remedies available from the Army Board for the Corrections of Military Records, even though the Board lacked the power to compel the reinstatement the plaintiff requested).

Petitioner relies upon several cases in which this Court has refused to require exhaustion due to the "inadequacy" of the administrative remedy. The result in each of those cases, however, was not dictated by an inflexible rule of law precluding exhaustion of procedures that do not afford complete relief; rather, it was based upon the Court's determination that exhaustion was not consistent with Congress's intent under the particular statutory scheme at issue. See *Patsy*, 457 U.S. at 501-502 (noting that "legislative purpose" is "of paramount importance in the exhaustion context" because courts "should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent").

In *McNeese* v. *Board of Educ.*, 373 U.S. 668 (1963), the Court held, as a matter of statutory construction, that 42 U.S.C. 1983 was designed to supplement existing state remedies for violations of constitutional rights that were available "in theory" but not "in practice." Thus, the Court's ruling that exhaustion of state remedies is not a prerequisite to a

Section 1983 suit arose out of its determination that such a requirement would subvert the Congressional intent behind Section 1983. Similarly, in *Honig* v. *Doe*, 484 U.S. 305, 327 (1988), the Court indicated that exhaustion of an administrative remedy would not be required where it would be futile because "we have no reason to believe that Congress meant to require [exhaustion] * * * in all cases, no matter how exigent the circumstances." Most recently, in *Coit Indep. Joint Venture*, 489 U.S. at 586-587, the Court held that the administrative claims procedure established by the Federal Bank Board "exceed[ed] [the agency's] statutory authority" because it allowed FSLIC "to delay the administrative processing of claims indefinitely * * * while the statute of limitations runs," thus potentially depriving litigants of a state law remedy that Congress did not intend to extinguish. See also *id.* at 589 (Scalia, J., concurring in part and concurring in the judgment) ("What is enough to suggest a congressional intent to defer the maturing of a federal cause of action is not enough to suggest a congressional intent to override state law."). See also *Felder* v. *Casey*, 487 U.S. 131 (1988).

These cases—in which the Court inferred that Congress did not intend "to defer the maturing of a * * * cause of action" pending exhaustion of the administrative procedures at issue—are accordingly inapposite in this case. The *Bivens* action was not created by Congress, so there is no concern that exhaustion of BOP procedures is inconsistent with congressional intent. On the contrary, the adoption of Section 1997e reveals a congressional policy supporting the application of exhaustion in this case. Under these circumstances, it is entirely appropriate for this Court to impose an exhaustion requirement

regardless of the availability of complete relief from the agency.

This Court has already determined that it can decline to exercise its jurisdiction under *Bivens* in deference to an administrative scheme that could "not provide complete relief for the plaintiff." *Bush* v. *Lucas*, 462 U.S. at 388. In *Bush*, this Court held that it would not exercise its power to provide redress to federal employees allegedly injured by adverse personnel actions in violation of their First Amendment rights because an important, but incomplete, administrative remedy was available. In this case, BOP does not seek to displace the *Bivens* remedy, but merely to delay it briefly to afford its administrative processes an opportunity to work effectively. *Bush* clearly allows this minimal accommodation to federal policy.

3. Petitioner's procedural objections (Br. 12-17) to the BOP grievance process also lack force. First, the fact that the BOP process provides for no formal fact-finding hearings does not impair claimants' rights to seek relief under *Bivens* because BOP does not seek to obtain estoppel effect for its findings. There are obvious benefits to permitting expeditious investigation and resolution, unimpeded by the need for formal proceedings on the record. More elaborate proceedings may be necessary to the proper exercise of adjudicatory functions, but not to prison administration. See *Coit Indep. Joint Venture*, 489 U.S. at 580-584 (indicating that an administrative process that lacks adjudicatory safeguards nevertheless serves important purposes in the resolution of claims).

Similarly, the fact that BOP is not required to apply particular laws or rules to its review of prisoner complaints also does not impair *Bivens* rights.

Prison officials are under an obligation to comply with the Constitution, relevant statutes, and regulations governing every aspect of prison life in reviewing and acting on prisoner complaints.[16] The responsibility for determining legal issues is ultimately vested in this Court in any event.

Finally, the process does not create an impermissible "conflict of interest" because it requires submission of the claim to the warden—a potential *Bivens* defendant. Pet. Br. 19. Although this Court acknowledged in *Coit Indep. Joint Venture*, 489 U.S. at 587, that FSLIC, as a competing creditor, may have an inherent conflict of interest with claimants, it nevertheless indicated that claimants could be required to submit their claims to FSLIC for consideration before going to court. In addition, the BOP process includes safeguards designed to ensure the fairness of the decisionmaking process.[17]

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[16] The court of appeals' statement that "administrative consideration is not to resolve constitutional issues" (see Pet. Br. 13 n.11) is accurate only insofar as the main focus of BOP's task is not to adjudicate questions of constitutionality, but, rather, to determine if corrective action should be taken in light of BOP's legal obligations. In any event, the policy considerations that justify the grievance requirement do not depend on the formal resolution of all issues that may be decided in a subsequent lawsuit.

[17] The grievance regulations remove authority from the officials whose conduct is under investigation. Para. 6(c) of Federal Prison System Program Statement 1330.7 provides that "complaints of staff misconduct should not be investigated by the staff member complained about," and the regulations allow prisoners to bypass wardens in "sensitive" cases by filing complaints with the Regional Director. See 28 C.F.R. 542.13(c).

CONCLUSION

The judgment of the court of appeals should be affirmed.[18]

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[18] This Court need not reach the question of whether petitioner's action should be dismissed with prejudice. If petitioner chooses to file an amended complaint based upon allegations that he has now exhausted his administrative remedies, or failed to exhaust for reasons that should not bar his claim, he is free to do so, because the dismissal in this case was issued without prejudice. It should be left to BOP and the lower courts on review to determine whether application of the exhaustion doctrine requires a dismissal with prejudice on the particular facts in this lawsuit or in any new *Bivens* action that petitioner might file in the future. Specifically, BOP should decide in the first instance whether any grievance petitioner might now file is timely and, if not, whether petitioner had a "valid reason" for any delay in filing or appeal. 28 C.F.R. 542.13(b), 542.15. See, *e.g.*, *Greene* v. *Meese*, 875 F.2d 639, 641 (7th Cir. 1989) (remand to BOP to decide if untimely filing is excusable).

The fact that petitioner is no longer in federal confinement does not preclude recourse to BOP grievance procedures for claims that arose while in federal custody. The regulations state that the BOP procedures apply "to all inmates confined in the Bureau of Prisons institutions," but not "to inmates confined in non-federal facilities." 28 C.F.R. 542.10. BOP does not interpret this regulation to exempt individuals no longer confined in federal facilities from filing complaints or completing appeals before filing a lawsuit based on conditions of confinement in the federal prison system. Rather, the regulation serves to make clear that the procedures are not designed to address conditions of confinement in non-federal facilities for prisoners serving time on federal charges.

Respectfully submitted.

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